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13 *[Proposed] Lead Counsel*

14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 SAN FRANCISCO DIVISION

17 HARRY W. PLICHTA, Individually and On
 18 Behalf of All Others Similarly Situated,

19 Plaintiff,

20 v.

21 SUNPOWER CORPORATION, THOMAS
 22 H. WERNER, and DENNIS V. ARRIOLA,

23 Defendants.

24 Case No. CV 09-5473-CRB

25 **INSTITUTIONAL INVESTOR
 26 FUNDS' NOTICE OF MOTION AND
 MOTION FOR (i)
 27 CONSOLIDATION OF RELATED
 ACTIONS; (ii) APPOINTMENT AS
 28 LEAD PLAINTIFF; AND (iii)
 APPROVAL OF THEIR
 SELECTION OF LEAD COUNSEL;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

Date: February 26, 2010
 Time: 10:00 a.m.
 Courtroom: 8, 19th Floor
 Judge: Charles R. Breyer

1 CHENGXIAO CAO, Individually and On
2 Behalf of All Others Similarly Situated,

3 Plaintiff,

4 v.

5 SUNPOWER CORPORATION,
6 PRICEWATERHOUSECOOPERS LLP,
7 THOMAS H. WERNER, DENNIS V.
8 ARRIOLA, EMMANUEL T.
9 HERNANDEZ, and MARTY T. NEESE,

10 Defendants.

11 STEVEN PARRISH, Individually and On
12 Behalf of All Others Similarly Situated,

13 Plaintiff,

14 v.

15 SUNPOWER CORPORATION, THOMAS
16 H. WERNER, and DENNIS V. ARRIOLA,

17 Defendants.

18 Case No. CV 09-5488-BZ

19 Case No. CV 09-5520-CRB

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that the Arkansas Teacher Retirement System, Första-AP
4 Fonden and Danske Invest Management A/S (collectively, the “Institutional Investor Funds”)
5 will hereby move, on February 26, 2010, at 10:00 a.m., in Courtroom 8 of the United States
6 Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, for an order: (1)
7 consolidating all related actions; (2) appointing the Institutional Investor Funds as lead plaintiff
8 pursuant to the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-4,
9 *et seq.*; and (3) approving their selection of Bernstein Litowitz Berger & Grossmann LLP
10 (“Bernstein Litowitz”), Barroway Topaz Kessler Meltzer & Check, LLP (“Barroway Topaz”)
11 and Kaplan Fox & Kilsheimer LLP (“Kaplan Fox”) as lead counsel for the class.

12 This Motion is made on the grounds that the Institutional Investor Funds timely filed this
13 Motion and are the “most adequate plaintiff” pursuant to the PSLRA. 15 U.S.C. §78u-
14 4(a)(3)(B).

15 The Institutional Investor Funds have also selected and retained counsel who have served
16 as class counsel in numerous complex securities class actions before this Court and have
17 successfully prosecuted securities class actions together in the past. The Institutional Investor
18 Funds thus seek this Court's approval of their selection of Bernstein Litowitz, Barroway Topaz
19 and Kaplan Fox as lead counsel pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v).

MEMORANDUM OF POINTS AND AUTHORITIES

The Arkansas Teacher Retirement System, Första-AP Fonden and Danske Investment Management A/S respectfully submit this memorandum of law in support of their motion for: (1) consolidation of the related actions; (2) appointment as lead plaintiff, pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78u-4(a)(3)(B), as amended by the PSLRA; and (3) approval of their selection of Bernstein Litowitz, Barroway Topaz and Kaplan Fox as lead counsel for the class.

I. PRELIMINARY STATEMENT

Currently pending in this District are three related class actions (the “Actions”), brought on behalf of all persons who purchased SunPower Corporation (“SunPower” or the “Company”) securities between April 17, 2008 and November 16, 2009 (the “Class Period”). The Actions allege violations of Sections 10(b) and 20(a) of the Exchange Act as amended by the PSLRA (15 U.S.C. §§ 78j(b) and 78t), and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5), against SunPower and certain of its executive officers. The first Action was filed on November 18, 2009 by Harry W. Plichta.¹

The Actions should be consolidated because they involve common issues of law and fact. *See* Fed. R. Civ. P. 42(a) (“Rule 42(a)’’); §III.A., *infra*. After the Court’s ruling on consolidation, the Institutional Investor Funds should be selected as lead plaintiff because, to the best of their knowledge, they have the largest financial interest in the relief sought by the class. *See* Abadou Decl., Exhibits B-C; *In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002); *Hodges v. Akeena Solar, Inc.*, 2009 U.S. Dist. LEXIS 103663, at *5-*6 (N.D. Cal. 2009). In addition, the Institutional Investor Funds satisfy the requirements of Fed. R. Civ. P. 23 (“Rule 23”) because their claims are typical and they will fairly and adequately represent the class’ interests. *See Richardson v. TVIA, Inc.*, 2007 U.S. Dist. LEXIS 28406, at *15 (N.D. Cal. 2007) (citing *Cavanaugh*, 306 F.3d at 730). Finally, in accordance with the PSLRA, the Institutional

¹ A copy of Mr. Plichta's notice is attached as Exhibit A to the Declaration of Ramzi Abadou in Support of the Institutional Investor Funds' Motion for (i) Consolidation of Related Actions; (ii) Appointment as Lead Plaintiff; and (iii) Approval of Their Selection of Lead Counsel (the "Abadou Decl.").

1 Investor Funds' selection of lead counsel should be approved. *See* §III.C, *infra*; 15 U.S.C. §78u-
 2 4(a)(3)(B)(v).

3 **II. STATEMENT OF FACTS**

4 SunPower designs, manufactures and markets high-power solar electric power
 5 technologies, including solar panels and their component parts. As set forth in the Company's
 6 public filings with the Securities and Exchange Commission ("SEC"), SunPower's solar
 7 products offer higher efficiency than conventional solar technology. Prior to its initial public
 8 offering in late 2005, SunPower developed its first manufacturing facility in the Philippines,
 9 capable of mass-producing its "high-efficiency" cell design at significantly lower costs than
 10 previous facilities. Over the next few years, SunPower experienced surging growth, with
 11 revenues increasing from \$80 million in 2005 to \$1.4 billion in 2008, due in part to the
 12 Company's acquisition of one of its largest customers, PowerLight Corp. Despite the substantial
 13 increases in revenue, profits over the same period failed to keep pace, causing investor concern
 14 over production costs. High production costs could result in higher prices for customers, lower
 15 profit margins for the Company, or both.

16 Throughout the Class Period, defendants issued false and misleading statements that led
 17 investors to believe that the Company had successfully weathered a downturn in the solar power
 18 market and that it was poised for tremendous growth. Specifically, SunPower reported inflated
 19 earnings and gross margins throughout the Class Period that were buoyed by what the Company
 20 now admits were "unsubstantiated accounting entries." Significantly, these fictitious accounting
 21 entries masked problems associated with one of SunPower investors' key concerns – the
 22 comparatively high production costs involved in manufacturing the Company's industry-leading
 23 high-efficiency solar cells. Moreover, SunPower executives repeatedly assured investors that the
 24 Company had adequate internal controls and had implemented enhanced measures intended to
 25 "simplify and strengthen our system of internal control." The Company made these claims even
 26 as the SEC was questioning the Company over the very internal control issues that apparently
 27 enabled these accounting "errors" to occur.

28 After the close of the market on November 16, 2009, SunPower stunned investors by

1 disclosing that an “internal review” uncovered “unsubstantiated accounting entries” that
 2 understated the Company’s cost of goods sold (“COGS”) – or the costs directly attributable to
 3 the production of solar cells – by an aggregate of \$15 million over the three prior quarters, an
 4 amount that would nearly eliminate the Company’s entire publicly reported net income for the
 5 first half of 2009. The Company warned in its press release that “there can be no assurance that
 6 broader issues do not exist,” and informed investors that they could no longer rely on its reported
 7 financial results from 2009 and its 2008 Form 10-K. Investors reacted immediately when the
 8 Company announced its potential need to restate, driving the price of SunPower stock down
 9 18.5%, with the Company’s Class A shares falling from \$27.50 per share to \$22.19 per share,
 10 and erasing almost half a billion dollars in shareholder value in a single day. On December 15,
 11 2009, SunPower disclosed that it had made “significant progress” in its investigation into the
 12 accounting irregularities and that the “investigation to date is consistent with the preliminary
 13 findings announced on November 16, 2009.”

14 **III. ARGUMENT**

15 **A. The Related Actions Should Be Consolidated**

16 The PSLRA provides that “[i]f more than one action on behalf of a class asserting
 17 substantially the same claim or claims arising under this title [] has been filed,” courts shall not
 18 appoint a lead plaintiff until “after the decision on the motion to consolidate is rendered.” 15
 19 U.S.C. §78u-4(a)(3)(B)(ii); *see also In re Century Aluminum Co. Sec. Litig.*, 2009 U.S. Dist.
 20 LEXIS 81205, at *6-*8 (N.D. Cal. 2009) (“A court must rule on a motion to consolidate before it
 21 can rule on a motion to appoint a lead plaintiff.”). There are at least three related securities class
 22 actions pending in this District on behalf of investors who purchased SunPower securities during
 23 the Class Period:

<u>Abbreviated Case Name</u>	<u>Case Number</u>	<u>Date Filed</u>
<i>Plichta v. SunPower Corp., et al.</i>	09-5473-CRB	11/18/09
<i>Cao v. SunPower Corp., et al.</i>	09-5488-BZ	11/18/09
<i>Parrish v. SunPower Corp., et al.</i>	09-5520-CRB	11/20/09

27 Under Rule 42(a), consolidation is appropriate where the actions involve common
 28

1 questions of law or fact. *City of Ann Arbor Employees' Ret. Sys. v. Accuray Inc.*, 2009 U.S. Dist.
 2 LEXIS 105466, at *4-*5 (N.D. Cal. 2009). Here, the Actions present virtually identical factual
 3 and legal issues, arising out of the same alleged course of misconduct – the purchase of
 4 SunPower securities at artificially inflated prices during the Class Period. Accordingly,
 5 consolidation is appropriate. *See Century Aluminum*, 2009 U.S. Dist. LEXIS 81205, at *6-*8.

6 **B. The Institutional Investor Funds Are the Most Adequate Plaintiff**

7 The PSLRA establishes a presumption that the “most adequate plaintiff” is the “person or
 8 group of persons” that “has the largest financial interest in the relief sought by the class” and
 9 “otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15
 10 U.S.C. §78u-4(a)(3)(B)(iii); *see also Cavanaugh*, 306 F.3d at 730; *In re Versata, Inc. Sec. Litig.*,
 11 2001 U.S. Dist. LEXIS 24270, at *26 (N.D. Cal. 2001).

12 **1. The Institutional Investor Funds' Motion is Timely**

13 The PSLRA permits any member or members of the class to move for appointment as
 14 lead plaintiff within 60 days of the publication of notice that the first action asserting
 15 substantially the same claims has been filed. *See* 15 U.S.C. § 78u-4(a)(3)(A). Here, in
 16 connection with the filing of the first-filed action, notice was published on November 18, 2009,
 17 by Harry W. Plichta, which provided a deadline to seek lead plaintiff status by January 19, 2010.
 18 *See* Abadou Decl., Exhibit A. The Institutional Investor Funds' motion is therefore timely.

19 **2. The Institutional Investor Funds Have the Largest Financial Interest
 20 in the Relief Sought by the Class**

21 With losses exceeding \$4.8 million, the Institutional Investor Funds have the largest
 22 financial interest in the relief sought by the class. Abadou Decl. at Exhibits B-C; 15 U.S.C. §
 23 78u-4(a)(3)(B)(iii); *see also Cavanaugh*, 306 F.3d at 730. To the best of the Institutional
 24 Investor Funds' knowledge, there are no other applicants who have sought, or are seeking,
 25 appointment as lead plaintiff that have a larger financial interest arising from the purchase of
 SunPower securities.

26 **3. The Institutional Investor Funds Satisfy the Requirements of Rule 23**

27 On a motion to serve as lead plaintiff, a movant must only make a preliminary showing
 28 that it satisfies the typicality and adequacy requirements of Rule 23. *See Richardson*, 2007 U.S.
 MOTION FOR APPOINTMENT AS LEAD PLAINTIFF

1 Dist. LEXIS 28406, at *15 (citing *Cavanaugh*, 306 F.3d at 730). Here, the Institutional Investor
 2 Funds satisfy both requirements. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii).

3 Typicality turns on “whether other members have the same or similar injury, whether the
 4 action is based on conduct which is not unique to the named plaintiffs, and whether other class
 5 members have been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976
 6 F.2d 497, 508 (9th Cir. 1992) (citing *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985));
 7 *see also Richardson*, 2007 U.S. Dist. LEXIS 28406, at *17 (typicality satisfied where the
 8 proposed lead plaintiff shared substantially similar questions of law and fact with other members
 9 of the class and the claims arose from the same course of conduct by defendants). Here, the
 10 Institutional Investor Funds’ claims arise from the same course of conduct as the claims of the
 11 other members of the class: (i) the purchase of SunPower securities during the Class Period; (ii)
 12 at prices allegedly artificially inflated by defendants’ materially false and misleading statements
 13 and/or omissions; and (iii) being damaged thereby. *See id.* Accordingly, the Institutional
 14 Investor Funds are typical.

15 The Institutional Investor Funds are also adequate. Under Fed. R. Civ. P. 23(a)(4), the
 16 representative parties must fairly and adequately protect the interests of the class. This
 17 requirement is met if “there are no conflicts between the representative and class interests and
 18 the representative’s attorneys are qualified, experienced, and generally able to conduct the
 19 litigation.” *Richardson*, 2007 U.S. Dist. LEXIS 28406, at *16 (citing Fed. R. Civ. P. 23(a)(4);
 20 *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003)). The Institutional Investor Funds
 21 satisfy these requirements. The Institutional Investor Funds’ interests are aligned with those of
 22 the other members of the class and are not antagonistic in any way. There are, furthermore, no
 23 facts suggesting that any actual or potential conflict of interest or other antagonism exists
 24 between the Institutional Investor Funds and other class members. The Institutional Investor
 25 Funds’ Certifications and Joint Declaration in Support of Their Motion for Appointment as Lead
 26 Plaintiff and Approval of Their Selection of Lead Counsel (“Joint Declaration”), affirms their
 27 understanding of the duties they owe to the class and their commitment to oversee the
 28 prosecution of this class action. *See* Abadou Decl. at Exhibit D. This evidence demonstrates

1 that the Institutional Investor Funds accept the fiduciary obligations they will assume if
 2 appointed as lead plaintiff in this action. *Id.*

3 In addition, the Institutional Investor Funds are the very sort of lead plaintiff envisioned
 4 by Congress in enacting the PSLRA – a small group of three sophisticated institutional investors
 5 with real financial interests at stake in the litigation. *See* H.R. Conf. Rep. No. 104-369, at 34
 6 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 690 (explaining that “increasing the role of
 7 institutional investors in class actions will ultimately benefit the class and assist the courts by
 8 improving the quality of representation in securities class actions”). Finally, the Institutional
 9 Investor Funds have further demonstrated their adequacy by their selection of highly qualified
 10 counsel to represent the class.

11 **C. The Court Should Approve the Institutional Investor Funds’ Selection of
 12 Lead Counsel**

13 Subject to Court approval, lead plaintiff movants are empowered to select and retain
 14 counsel to represent the class they seek to represent. 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court
 15 should not disturb lead plaintiff’s choice of counsel unless it is necessary to “protect the interests
 16 of the class.” 15 U.S.C. §78u-4(a)(3)(B)(iii)(II)(aa); *see also Cavanaugh*, 306 F.3d at 734. Here,
 17 the Institutional Investor Funds have selected and retained Bernstein Litowitz, Barroway Topaz
 18 and Kaplan Fox as proposed lead counsel. *See In re Cohen*, 586 F. 3d 703, 709 (9th Cir. 2009).

19 These firms are among the preeminent securities class action law firms in the country,
 20 with the skill and knowledge necessary to prosecute this action effectively and expeditiously.
 21 *See* Abadou Decl. at Exhibits E-G. Each of these firms have successfully prosecuted numerous
 22 securities fraud class actions and obtained excellent results on behalf of defrauded investors
 23 around the country, and before this Court. *Id.* Barroway Topaz and Kaplan Fox served as
 24 plaintiffs’ counsel in *In re Brocade Securities Litigation*, No. 3:05-cv-02042-CRB (N.D. Cal.)
 25 where they helped recover \$160 million for damaged investors. Kaplan Fox served as co-lead
 26 counsel in *In re Informix Securities Litigation*, No. 3:97-cv-01289-CRB (N.D. Cal.) and
 27 recovered \$136.5 million for harmed investors. Bernstein Litowitz served as lead counsel in *In
 28 re Clarent Corporation Securities Litigation*, No. 3:01-cv-03361-CRB (N.D. Cal.) and obtained
 a favorable jury verdict finding the Chief Executive Officer of Clarent Corporation and the

1 company's former auditor liable for violations of federal securities laws, leading to a recovery of
 2 millions of dollars for damaged investors. Together, Bernstein Litowitz, Barroway Topaz and
 3 Kaplan Fox are currently serving as co-lead counsel in *In re Bank of America Securities*
 4 *Litigation*, No. 1:09-md-02058-DC (S.D.N.Y.) on behalf of a group of foreign and domestic
 5 institutional investors who, like the Institutional Investor Funds, came together in pursuit of
 6 shared goals to effectively prosecute the action on behalf of all harmed investors.

7 Accordingly, the Court should approve the Institutional Investor Funds' selection of lead
 8 counsel for the class.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Institutional Investor Funds respectfully request that the
 11 Court: (1) consolidate all related actions; (2) appoint the Institutional Investor Funds as lead
 12 plaintiff; and (3) approve their selection of lead counsel.

13 Dated: January 19, 2010

Respectfully submitted,

14 BARROWAY TOPAZ KESSLER
 15 MELTZER & CHECK LLP

16 _____/s/ *Ramzi Abadou* _____

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1 **ATTESTATION PURSUANT TO GENERAL ORDER 45**

2 I, Ramzi Abadou, attest that concurrence in the filing of this document has been obtained
3 from the other signatories. I declare under penalty of perjury under the laws of the United States
4 of America that the foregoing is true and correct. Executed this 19th day of January, 2010, at
5 San Francisco, California.

6

7 _____*/s/ Ramzi Abadou*_____

8 RAMZI ABADOU

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CERTIFICATE OF SERVICE

I certify that on the 19th day of January 2010, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF Registrants:

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I further certify that on the 19th day of January, 2010, I served the same document by U.S. Postal service on the following, who are not registered participants of the ECF system in this case:

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